CF0000058368

(2)

XII-189 (ii)
C. J. P. 11/94/2,000

Cr. A. No. - 1794/95

APPEAL OF PRISONER

Division Bench (Criminal)

No. 3.9.94/498 Name देवराज

Father's name पुखलाल पटेल साकिन सरकिया आना अंजुघटपुर

Residence जिला सरगुजा (अंबि) Age 35 वर्ष

Sentenced to आजन्म कारावास On 23/11/95

Under section 302 भा.दं.वि. by अपर सत्र न्यायाधीश महेन्द्रगढ़ (सरगुजा म.प्र.)

It is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear within seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement 23/11/95

2 Date on which copy received 30/11/95

3 Date on which Appeal sent 12/12/95

4 Whether the prisoner wishes to be represented or ~~not~~ - Yes / No

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No. 3.9.94/498 Name देवराज आत्म पुखलाल

Confined in केन्द्रीय Jail अंबिकापुर (सरगुजा)

No. 97/ Law/ Dated 1995 दि. 12.12.95

Forwarded to the ~~CHIEF JUDICIAL MAGISTRATE~~ अतिरिक्त जिला मजिस्ट्रेट अम्बिकापुर जिला सरगुजा

togather which a copy of judgement or order passed in the case for favour of transmission to the proper Appellate Court.

संलग्न निर्णय प्रतिलिपि
दि. 23/11/95 तथा मुकदमा क्रमांक 259/94

Superintendent
केन्द्रीय जेल, अंबिकापुर (सरगुजा)

Date of receipt in office

Date of receipt record to accompany the

Memo of Appeal to the Appellate court

No Dated 199

Forwarded to the

Date of receipt in Appellate Court

High Court of Madhya Pradesh
JABALPUR
15 DEC 1995
Reg. No. 9233
Recpt Clerk
High Court, Jabalpur

(P. T. O.)

XI-HC-22

(9)

H.F.R.

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आदेश पत्रक

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo and
Hon'ble Mr. Dhirendra Mishra, JJ

21-2-2006

Mr. Vijay Kumar Pandey, counsel for the appellant.

Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. M.P.S. Bhatia, Panel Lawyer for the State/respondent.

Oral judgment dictated on *Dais*.

Per L.C. Bhadoo, J: -

This appeal is directed against the judgment of conviction and order of sentence dated 23-11-1995 passed by the Additional Sessions Judge, Manendragarh, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the Indian Penal Code, sentenced him to undergo imprisonment for life.

The case of the prosecution, in brief, is that on 20th April, 1994, at about 7 p.m., Ramavtar (PW-2) was at his residence, at that time, the accused came to his house carrying axe in his hand and the deceased carrying Baluwa (carpenter's axe) in his hand came chasing the accused and both of them started quarrelling. In that process, the accused assaulted the deceased with the axe. Seeing this, witness Ramavtar ran away and informed the villagers. He came along with the villagers to his house and saw that the deceased was lying dead. On account of night, the matter was not reported to the Police Station. However, on the next day morning i.e.

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21-4-1994, the matter was reported in the Police Station and the First Information Report (Ex.P-8) was by lodged by Ramavtar (PW-2) in Police Station: Chirmiri. After registering the case under Section 302 of the I.P.C., Sub Inspector J. Toppo (PW-7) left for the scene of occurrence and prepared the Panchnama (Ex.P-3) of the body of deceased Mangal. The body of Mangal was sent for post-mortem examination to Community Health Centre, Chirmiri, where Dr. R.R. Gajbhiye (PW-4) conducted post-mortem on the body of Mangal and prepared the post-mortem report (Ex.P-3). Site plan (Ex.P-1) was prepared by the Halka Patwari. Plain soil, blood stained soil and carpenter's axe were taken into possessions under Exs.P-1 & P-2. Weapon of offence axe was taken into possession under Ex.P-5 in pursuance of the memorandum (Ex.P-6) given by the accused.

After completion of investigation, charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Manendragarh, who in turn committed the case to the Sessions Judge, Surguja, from where learned Additional Sessions Judge, Manendragarh, received the case on transfer for trial.

The prosecution in order to establish charge against the accused examined seven witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the prosecution evidence and stated that he is innocent.

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आदेश का. दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित - 3 -	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

At the conclusion of trial and after hearing counsel for the parties, learned Additional Sessions Judge convicted and sentenced the accused as mentioned in para 1 of this judgment.

We have heard Mr. Vijay Kumar Pandey, learned counsel for the appellant and Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. M.P.S. Bhatia, learned Panel Lawyer on behalf of the State/respondent, and perused the judgment & record of the trial Court.

The homicidal death of Mangal is not in dispute.

Learned counsel for the appellant argued that it is evident from the evidence of prosecution witness Ramavtar (PW-2) that the deceased was chasing the accused while carrying carpenter's axe in his hand and in order to protect himself, the accused entered the house of Ramavtar, where the accused & the deceased started grappling and in that process the accused in order to defend himself, attacked the deceased with the axe, as the accused was having reasonable apprehension in his mind that unless he attack the deceased, he is likely to cause his death by assaulting with the carpenter's axe. Therefore, the accused acted in right of private defence and no offence against the accused is made out.

On the other hand, learned Additional Public Prosecutor and learned Panel Lawyer supported the judgment of the trial Court.

Nothing is an offence in terms of Section 96 of the Indian Penal Code, if it is done in exercise of the right of private defence. Section 99

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of the I.P.C. lays down the limit therefor. The right conferred upon a person in terms of Sections 96 to 98 and 100 to 106 is controlled by Section 99. In terms of Section 99 of the Indian Penal Code, the right of private defence, in no case, extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. Section 100 provides that the right of private defence of the body extends under the restrictions mentioned in the last preceding section to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be of any of the descriptions enumerated therein, namely, "First - Such an assault, as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; Secondly - Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault". To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden in this behalf is on the accused.

Section 102 of the I.P.C. deals with the commencement and continuance of the right of private defence of body. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt, or threat, to commit the offence, although the offence may not have been committed, but not until

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आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

there is reasonable apprehension. In other words, the right lasts so long as the reasonable apprehension of the danger to the body continues.

Section 105 of the Indian Evidence Act casts the burden of proof on the accused who sets up the plea of self-defence and in the absence of proof, it may not be possible for the Court to presume the correctness or otherwise of the said plea. No positive evidence although is required to be adduced by the accused; it is possible for him to prove the said fact by eliciting the necessary materials from the witnesses examined by the prosecution. He can establish his plea also from the attending circumstances, as may transpire from the evidence led by the prosecution itself.

In a large number of cases, Apex Court, however, has laid down the law that a person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailants who were armed with weapons. In moments of excitement and disturbed equilibrium it is often difficult to expect the parties to preserve composer and use exactly only so much force in retaliation commensurate with the danger apprehended to him where assault is imminent by use of force. All circumstances are required to be viewed with pragmatism and any hyper-technical approach should be avoided.

In case, if a defence is made out, the accused is entitled to be acquitted and if not he will be convicted of murder. But in case of use of

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excessive force, he would be convicted under Section 304 of the I.P.C. However, the right of private defence cannot be claimed when the accused is aggressor.

In **Sekar alias Raja Sekharan vs. State represented by Inspector of Police, T.N.** reported in **(2002) 8 SCC 354**, the Apex Court has observed that "in order to find whether right of private defence is available or not, the injuries receives by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities or all relevant factors to be considered".

In **Laxman Singh vs. Poonam Singh and others** reported in **2003 AIR SCW 4566**, the Apex Court held that "where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the Court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record".

Again in the matter of **State of M.P. vs. Ramesh** reported in **2005 AIR SC 1186**, the Apex Court held that "private defence can be used to ward off unlawful force, to prevent unlawful force, to avoid unlawful detention and to escape from such detention".

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Applying the above principles of law, now we shall scrutinize the facts and evidence available on record in the instant case.

Star witness of the case is Ramavtar (PW-2) in whose presence and in whose house the incident took place. He has stated in his evidence that in the evening, he was playing with his son and his wife was making arrangement for dinner, at that time, the accused came running to his house carrying axe in his hand, deceased Mangal was chasing the accused carrying carpenter's axe in his hand and both of them started grappling. He asked them not to quarrel. Even wives of both the accused & the deceased also came and they also tried to intervene, but the accused & the deceased did not accede to their request. In the mean time, accused Devraj attacked Mangal with the axe. Thereafter, he left the house and called the villagers. In cross-examination of this witness, he has stated that the deceased was brother-in-law (साला) of the accused. He further stated that the deceased came running with the carpenter's axe chasing the accused to kill him and the accused entered his house in order to protect himself, in that process they grappled with each other and the accused assaulted the deceased with the axe.

Therefore, in view of the above evidence of Ramavtar (PW-2), the accused came running carrying axe in his hand, whereas the deceased was chasing the accused having carpenter's axe in his hand and both started grappling in the house of this witness (PW-2), where the accused attacked

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the deceased with the axe. As per the medical evidence of Dr. R.R. Gajbhiye (PW-4), the deceased received following injuries: -

1. incised wound in the size of 4" x 1" x 1" inside the right hand on elbow;
2. $4\frac{1}{2}$" x 2" x 2" incised wound on left side of the chest above the nipple as a result of which rib was cut and the part of lung started protruding from that place;
3. 2" x 2" in oval shape lacerated from the top (parietal) bone of the skull; &
4. 4" x 2" x 1" on left side scapular surface.

The doctor further stated that on dissection of the body it was found that left lung was injured and 2nd & 3rd ribs were found cut. Except injury No.3, remaining injuries can be caused by a sharp edged weapon. Injuries were 2-3 days old. All the injuries were dangerous in nature and sufficient in the ordinary course of nature to cause death. The deceased died on account of shock.

It is true that the deceased was chasing the accused carrying carpenter's axe in his hand. As per the evidence, both started grappling, but in that process, the accused has not received even a single injury, whereas the accused repeatedly caused four grievous injuries on vital parts of the body of the deceased, which indicates that the accused did not stop after causing one or two injuries and he repeatedly caused four injuries, as the accused had not sustained any injury, it means on the first blow of axe

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given by the accused, the carpenter's axe must have fallen on the ground. However, the fact remains that the deceased chased the accused carrying carpenter's axe in his hand. Therefore, initially there was a reasonable apprehension that death will otherwise be the consequence of such assault and there was apprehension that grievous hurt will otherwise be the consequence of such assault made by the deceased party. However, when the accused assaulted the deceased with the axe and as per the second injury viz., incised wound on left side of the chest above the nipple as a result of which rib was cut and the part of lung started protruding from that place, by no stretch of imagination it can be said that even thereafter, the deceased was holding the axe in his hand in order to attack the accused and thereby the accused was still having reasonable apprehension of death or grievous injury. But, still, the accused assaulted the deceased with the axe.

In the circumstances, the accused attacked the deceased in the right of private defence, but he exceeded the right of private defence. Therefore, we are of the view that the appellant is liable to be punished under Section 304 Part-I of the I.P.C. as such, we are of the opinion that it would be appropriate to convict the accused under Part-I of Section 304 of the I.P.C., having regard to the gravity of the injuries caused with a dangerous weapon, each one of which was fatal, the appellant must be imputed with the intention to cause such bodily injury as was likely to cause

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death, if not the intention of causing death. Accordingly, we convict the accused/appellant under Section 304 Part-I of the I.P.C.

In the result, the appeal partly succeeds and the same is partly allowed. The accused is acquitted of charge under Section 302 of the I.P.C. and conviction & sentence awarded under that Section are set aside, instead thereof, he is convicted under Section 304 Part-I of the I.P.C. and sentenced to undergo R.I. for ten years. The accused is said to be in detention since 20th June, 1994, which has not been disputed by learned Additional Public Prosecutor, thereby, the accused has already served out more than 11 years' jail sentence. He be set at liberty forthwith, if not required in any other case.

Parties are entitled for certified copy of this order.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge

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